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IN THE

Supreme Court of the United States

October Term, 1961.

No. 101.

GOLDLAWR, INC.,

Petitioner,

v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION and UNITED BOOKING OFFICE, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENTS SELECT OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.

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OCTOBER TERM, 1961.

No. 101.

GOLDLAWR, INC.,

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v.

MARCUS HEIMAN, SELECT OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS SELECT OPERATING CORPORATION AND UNITED BOOKING OFFICE, INC.

OPINIONS BELOW.

The majority and dissenting opinions of the Court of Appeals below (R. 103-20) are reported at 288 F. 2d 579. The opinion of the district court below (R. 60-66) is reported at 175 F. Supp. 793. The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 25-45) is reported at 169 F. Supp. 677.

QUESTION PRESENTED.

Does Section 1406(a) of the Judicial Code empower a district court to transfer a private antitrust action to another district when the transferor court lacks personal jurisdiction over the defendants?

STATUTE SOUGHT TO BE INVOKED.

Petitioner seeks to invoke Section 1406(a) of the Judicial Code, 28 U. S. C. § 1406(a), in support of its contention that a district court has the power to transfer a private antitrust action to another district when the transferor court lacks personal jurisdiction over the defendants. Section 1406(a) provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

COUNTER STATEMENT OF THE CASE.

These are two of eight private antitrust actions which have been instituted by petitioner against a total of fourteen corporate and individual defendants, including respondents Select Operating Corporation and United Booking Office, Inc., a dissolved corporation, under Sections 1 and 2 of the Sherman Act, in the United States District Courts for the Eastern District of Pennsylvania and the Southern District of New York. Each of the causes of action alleged in each of the complaints [1] or amended complaints are identical.[2]

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1. Four of the fourteen complaints, amended complaints or second amended complaints which have been filed at various times in the eight actions are reproduced in the Record by designation of petitioner (R. 13-17; R. 21-25; R. 47-53; R. 53-59).

2. The eight actions (some of which have been consolidated for certain purposes) including the district court in which they were

Following the decision of *William Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F. 2d 738 (3rd Cir. 1945), *cert. den.* 334 U. S. 811 (1948) in which William Goldman Theatres, Inc.,[3] as lessee of Philadelphia's Erlanger Theatre was accorded the right to exhibit first-run motion pictures at the Erlanger,[4] William Goldman Theatres, Inc. acquired and successfully operated three down-town first-run motion picture theatres and failed to exhibit any of such films at the

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instituted, the civil action number by which they are designated and the number of defendants named in each are as follows:

	Court	Civil Action No.	Individual and/or Fiduciary Defendants	Corporate Defendants
(a)	E.D Pa.	21506	6	4
(b)	E.D.Pa.	22092	7	6
(c)*	S.D.N.Y.	144-243	4	2
(d)*	S.D.N.Y.	144-244	4	2
(e)**	S.D.N.Y.	149-349	2	2
(f)***	S.D.N.Y.	60-4046	2	2
(g)***	S.D.N.Y.	60-4047	5	2
(h)***	E.D.Pa.	28721	3	3

* Denotes one of the two instant actions.

** Timely demands for jury trials were made in all of the actions except Civil Action No. 149-349.

*** Denotes an action which subsequently was dismissed by stipulation pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure and the complaint in which was thereby deemed to have been served as a supplemental complaint pursuant to Rule 15(d) in one or more of the previously pending actions.

3. All the stock of William Goldman Theatres, Inc. was and is owned or controlled by Mr. William Goldman who is the sole shareholder of petitioner.

4. The Erlanger was there described as "suitable for profitable exhibition of first-class feature motion pictures on first-run in competition with the theatres" operated by the exhibitor defendants. 150 F. 2d at 742. In addition to injunctive relief, the plaintiff was awarded $375,000 treble damages and an attorney's fee. *William Goldman Theatres, Inc. v. Loew's, Inc.*, 69 F. Supp. 103 (E. D. Pa. 1946), *petition to file bill of review denied*, 163 F. 2d 241 (3rd Cir. 1947), *aff'd* 164 F. 2d 1021 (3rd Cir. 1948).

Erlanger.[5] Thereafter, on February 21, 1950, the United States of America filed a civil antitrust action charging numerous individual and corporate defendants, including respondent United Booking Office, Inc. with violations of Sections 1 and 2 of the Sherman Act in *United States v. Shubert, et al.*, United States District Court for the Southern District of New York, Civil Action No. 56-72.[6] On September 1, 1950, approximately six and one-half months after the commencement of *United States v. Shubert*, William Goldman Theatres, Inc., cancelled its lease to the Erlanger and on the same date petitioner by lease acquired the right to operate the Erlanger. On October 17, 1956, eight months after the entry of a Consent Decree [7] in *United States v. Shubert*, petitioner filed one of the instant actions, complaining that defendants, including respondents, had deprived petitioner of its ability to acquire legitimate theatrical attractions for presentation at the Erlanger in violation of the antitrust laws.[8]

After an unsuccessful attempt to make effective service upon respondents in the Eastern District of Pennsylvania,[9] petitioner sought to invoke Section 12 of the Clayton Act,

5. *William Goldman Theatres, Inc. v. Loew's, Inc.*, 163 F. 2d 241 (3rd Cir. 1947).

6. Respondent Select Operating Corporation was not a party to that litigation.

7. The Consent Decree was entered before any testimony had been taken.

8. On February 18, 1957 petitioner instituted the second of the instant actions which differed from the first only to the extent that the second added certain defendants and sought to extend the period for which damages were claimed. At the times when each of the actions was commenced, each of the defendants was subject to suit under the antitrust laws in the Southern District of New York, but only three of the corporate and three of the individual defendants were or have been held to have been amenable to suit in the Eastern District of Pennsylvania. See *Goldlawr v. Shubert*, 169 F. Supp. 677 (E. D. Pa. 1958) (R. 25).

9. Although petitioner now states that "service was originally made upon all defendants" in Philadelphia (Petitioner's Brief p. 3), petitioner has never contended, nor does it now contend, that the pur-

15 U. S. C. § 22, and caused a purported service of the summonses and complaints in both actions to be made upon respondents Select Operating Corporation and United Booking Office, Inc. in the Southern District of New York. Thereafter, respondents and others filed timely motions to dismiss the actions for lack of jurisdiction over their persons, to dismiss for improper venue and to quash the returns of service.

On December 22, 1958, the District Court for the Eastern District of Pennsylvania, Kraft, J., rendered an opinion (R. 25-45) in which the motions of the corporate respondents to dismiss for improper venue were granted on the ground that neither was an inhabitant, or was found or transacted business in the Eastern District of Pennsylvania within the meaning of Section 12 of the Clayton Act.[10] Before orders were entered in accordance with the opinion, however, petitioner filed a motion to transfer the actions to the District Court for the Southern District of New York. On March 3, 1959, "conformably to 28 U. S. C. A. § 1406(a)" (R. 46), the District Court for the Eastern District of Pennsylvania ordered the actions transferred as to respondents and others[11] to the District Court for the Southern District

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ported service of process which petitioner attempted to make upon respondents in the Eastern District of Pennsylvania was effective.

Moreover, petitioner acknowledges the fact that the District Court for the Eastern District of Pennsylvania lacked jurisdiction over the persons of respondents in its statement of the Question Presented both in its Petition and Brief and accordingly is foreclosed from asserting any contrary contention at this time.

10. At the same time, motions to dismiss for lack of personal jurisdiction, improper venue and to quash returns of service were denied with respect to J. J. Shubert, John Shubert and Select Theatres Corporation (the parent corporation of respondent Select Operating Corporation) as to whom and Lawrence Shubert Lawrence, Modern Theatre Corporation, Barrymore Theatre Corporation and L. A. B. Amusement Corporation, petitioner's actions presently are pending in the Eastern District of Pennsylvania.

11. In addition to respondents, the action was transferred as to defendants Sylvia W. Golde, Milton Shubert and William Klein.

of New York (R. 46-47), without determining whether the Pennsylvania court had jurisdiction over the persons of respondents.

Immediately following the transfer, respondents filed motions to dismiss the transferred actions in the district court below on the grounds that the transfers were invalid, improper and without statutory sanction. On August 10, 1959, the district court below, Palmieri, J., rendered an opinion (R. 60-66) holding that the extraterritorial service of process which petitioner caused to be made in New York was insufficient to subject respondents to the jurisdiction of the District Court for the Eastern District of Pennsylvania because Section 12 of the Clayton Act authorizes such service only when venue is properly laid in the district in which suit is commenced.[12]

Since the transferor court lacked jurisdiction over the persons of respondents, the district court below held that the transfer was invalid as to respondents because Section 1406(a) of the Judicial Code does not allow the transfer of a civil action to another district when the transferor court lacks personal jurisdiction over the defendants. Because the transferor court had already held that petitioner could not proceed in the Eastern District of Pennsylvania, the district court below directed that as to respondents[13] the

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12. To the same effect is *Bruner v. Republic Acceptance Corporation*, 191 F. Supp. 200, 203 (E. D. Ark. W. D. 1961). Petitioner did not challenge in the court below (see R. 107) or in its Petition, nor does petitioner now challenge the holding of the district court below that the extraterritorial service of process upon respondents in the Southern District of New York was insufficient to subject them to the jurisdiction of the Pennsylvania court. Accordingly, petitioner has conceded that the District Court for the Eastern District of Pennsylvania never acquired jurisdiction over the persons of respondents.

13. The remaining defendants as to whom the actions were transferred filed answers to the complaints before attempting to challenge the transfer. Judge Palmieri subsequently ruled that those defendants, unlike respondents, had waived the right to contest the transfer by filing answers. *Goldlawr v. Shubert*, 3 Fed. Rules Serv.

actions be dismissed [14] rather than remanded to the transferor district.

On February 21, 1961, the court below (Moore, J., Waterman, J., with Hincks, J. dissenting) affirmed the deci-

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2d, Case 3.2 at p. 35 (S. D. N. Y. 1960). As a result, the actions presently are pending as to the remaining defendants in the district court below.

14. On September 1, 1959, Judge Palmieri entered an order dismissing the actions as to respondents which expressly directed that "there is no just reason for delay and this Court directs the entry of judgment in favor of said Select Operating Corporation, United Booking Office, Inc., and Marcus Heiman" in conformity with Federal Rule 54(b) (R. 96-97). On September 25, 1959, petitioner filed a notice of appeal to the court below, and on November 30, 1959, respondents filed a motion to dismiss the appeal on the ground that the order of the district court below was interlocutory and not appealable.

On December 29, 1959, the court below (Lumbard, C. J., Swan, J., and Friendly, J.) held (R. 98-100) that the order was not appealable because an order directing dismissal of one or more, but less than all, of multiple defendants jointly charged, does not constitute "the entry of a final judgment upon one or more but less than all of the claims" presented in a multiple claims action within the meaning of Rule 54(b).*

On January 11, 1960, petitioner filed a petition for rehearing in the court below and in the alternative petitioned for amendment of the court's order to permit petitioner the right to appeal *nunc pro tunc*, under the Interlocutory Appeals Act, 28 U. S. C. § 1292(b).

On January 18, 1960, the court below denied the petition for rehearing, but vacated Judge Palmieri's order of September 1, 1959, "for the sole purpose of permitting him to 'enter a fresh decree' in which he may include the statement described in 28 U. S. C. § 1292(b) if in his full discretion he determines that such a statement is here justified" (R. 101-102).

On January 27, 1960, Judge Palmieri entered an order which included the statement contemplated by the Interlocutory Appeals Act (R. 66-67), and on February 2, 1960, petitioner filed an application in the court below for leave to take an interlocutory appeal. On March 7, 1960, the court below (Lumbard, C. J., Waterman, J., Moore, J., and Friendly, J., with Clark, J., dissenting) granted petitioner's application without opinion.

* By order dated April 17, 1961, this Court amended Rule 54(b) to permit appeals from orders dismissing one or more but less than all defendants in multiple defendant actions.

sion of the district court below holding that Section 1406(a) does not permit the transfer of an action to another district where the transferor court lacks jurisdiction over the persons of defendants (R. 103-120).

Certiorari was granted by this Court on October 9, 1961 (R. 121).

SUMMARY OF ARGUMENT.

The decisions below that Section 1406 does not permit transfer in the absence of personal jurisdiction are correct because the construction adopted below is the only one sanctioned by the statute.

1. Petitioner claims that although personal jurisdiction is a prerequisite to transfer when venue is proper but inconvenient under Section 1404, personal jurisdiction is not such a condition precedent to transfer under 1406. Petitioner's contention is logically inconsistent and imputes irrationality to Congress because both statutes which were enacted at the same time, are equally silent with respect to the requirement of personal jurisdiction. Congress would not have made personal jurisdiction prerequisite to transfer under 1404 when venue is inconvenient but proper and not have made such jurisdiction prerequisite to transfer under 1406 when venue is entirely defective. Nor would Congress, had it intended to authorize transfer in the absence of personal jurisdiction, have made such power turn on the impropriety of venue in the transferor district. Petitioner's contention imputes just such an intention to Congress since petitioner contends that transfers in the absence of personal jurisdiction are authorized only by 1406 which is inoperative unless venue is improper.

2. In addition, petitioner's contention must be rejected because Section 1406 is in the nature of a jurisdictional statute and as such must be strictly construed. Moreover, this Court's decision in *Hoffman v. Blaski*, 363 U. S. 335 (1960), which involved 1404, establishes a rule of strict construction of the transfer statutes and is entirely dispositive of petitioner's contention here.

3. Petitioner's contention also is meritless because it seeks to attribute an intention to Congress which flies in the face of the statute's legislative history.

4. The decisions upon which petitioner relies are either inapplicable to the transfer of civil antitrust actions or the proposition for which they are cited was not in issue in those cases.

5. The decisions below impose no restrictions upon the statute and do not, as the dissenting Judge below claimed make it applicable only when there is "no occasion for its use" because transfers under 1406 have been ordered when the transferor court had personal jurisdiction over the defendants but venue was improper, in a wide variety of types of cases. Nor should the decisions below be overturned, as petitioner contends, because of any "hardship" on the petitioner since such "hardship", if any, is of petitioner's own manufacture.

ARGUMENT.

The decisions below that Section 1406(a) does not permit transfer when the transferor court lacks personal jurisdiction are claimed by petitioner to "impose an unwarranted restriction upon the application of Section 1406(a)" [15] and petitioner urges that the "restriction" so imposed "is unduly burdensome".[16] Respondents submit that the decisions below are correct and that the holdings impose no "restriction" upon the statute nor are they "burdensome". On the contrary, respondents submit that the construction adopted by the courts below is the only one sanctioned by the statute.

This Court is asked merely to determine whether a statute which authorizes transfer of "a case laying venue in the wrong division or district" can be utilized to sanction the transfer of an action in order to cure another jurisdictional defect not mentioned or alluded to in the statute. This Court is not asked to determine either the constitutionality, propriety or desirability of a statute which purports to authorize transfer in the absence of personal jurisdiction. The only question before this Court is whether Congress has so provided in Section 1406(a) of the Judicial Code. Respondents submit that it has not.

I. The Construction of Section 1406(a) for Which Petitioner Contends Imputes Irrationality to Congress.

Had Congress sought to implement a policy favoring transfer in the absence of personal jurisdiction, respondents submit that it would not have chosen Section 1406 as its vehicle. Analysis of the transfer statutes, 28 U. S. C. §§ 1404(a), 1406(a), and of petitioner's contentions demonstrates that petitioner's attribution of such a purpose to Congress in enacting Section 1406, imputes irrationality

15. Petitioner's Brief, p. 6.

16. Id., p. 11.

to our national legislature. As a result, it is manifest that the construction which petitioner urges this Court to adopt must be rejected.

Section 1404 which is, as the court below remarked, "a legislative sibling to Section 1406" (R. 110), creates the power to transfer an action properly commenced in the transferor district when that forum is inconvenient. And Section 1406 authorizes transfer when venue is improperly laid in the transferor district. But neither statute purports to sanction transfer when the transferor court is without personal jurisdiction.

In *Hoffman v. Blaski*, 363 U. S. 335 (1960), which involved Section 1404, this Court refused to construe the phrase authorizing transfer of an action "to any other district or division where it might have been brought" to sanction a transfer otherwise "in the interest of justice" to a district in which the defendant could not have been sued absent his waiver of jurisdictional defenses. There this Court rejected an expansive construction of the express language of the statute notwithstanding its admittedly remedial purpose and notwithstanding the fact that the construction there urged was at least arguable.[17] Here, the construction of Section 1406 for which petitioner contends has no statutory language for its foundation. Rather, petitioner's contention necessarily depends upon Congress' failure to make personal jurisdiction an express condition precedent to transfer.

Since Section 1404 is likewise silent with respect to whether personal jurisdiction is prerequisite to transfer, lack of personal jurisdiction, by petitioner's reasoning, should not bar transfer to a more convenient forum under that statute. Petitioner, however, contends that such personal jurisdiction is a condition precedent to transfer under 1404 because that statute "is a codification of the common

17. See the dissenting opinion of Mr. Justice Frankfurter, in which Mr. Justice Harlan and Mr. Justice Brennan joined, in *Sullivan v. Behimer*, 363 U. S. at 351-69.

law doctrine of *forum non conveniens*, and in applying this doctrine it has been an historic requirement that the transferring court have personal jurisdiction over the defendant."[18] Can it be, as petitioner claims, that personal jurisdiction is a prerequisite to transfer under one but not the other of sibling statutes which are equally silent with respect to personal jurisdiction? Surely the absence of personal jurisdiction as a condition precedent to transfer under 1406 cannot be made to depend upon the fact that 1404 is the legislative descendant of a common law ancestor whereas 1406 is without such a progenitor. Why would Congress make personal jurisdiction a condition precedent to transfer when venue is merely inconvenient but proper, and not make personal jurisdiction such a condition precedent when venue is entirely defective?

Conversely, if Congress in enacting the transfer statutes intended to permit transfer when the transferor court lacked jurisdiction, why would it require that venue be improper as a condition precedent to such a transfer? If personal jurisdiction is a prerequisite to transfer under 1404 but not under 1406, as petitioner contends, it is clear that transfer to cure a defect of personal jurisdiction could be made only under the latter statute. But 1406 is inoperative unless venue is *improper* in the transferor district.[19] Accordingly no transfer to cure a defect of personal jurisdiction would be possible unless venue was also defective. Had Congress intended to permit transfer in the absence of personal jurisdiction, as petitioner contends, would Congress choose to implement such a policy by enacting a statute under which the power of transfer turns upon the impropriety of venue in the transferor district? Petitioner's contention imputes to Congress just such an intention.

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18. Petitioner's Brief, p. 11. See also 1 *Moore, Federal Practice*, ¶ 0.145 [3.-1], p. 1756 (2d ed. 1960); *Foster-Milburn Co. v. Knight*, 181 F.2d 949, 952-53 (2nd Cir. 1950).

19. *Riley v. Union Pacific R. Co.*, 177 F.2d 673 (7th Cir. 1949), *cert. den.* 338 U. S. 911 (1950).

Respondents can conceive of no reason why the propriety or impropriety of venue can or should have any bearing on the power of transfer in the absence of personal jurisdiction. Respondents submit that the only construction of 1406 which is consistent with Congressional rationality is the one adopted by the courts below and by the Court of Appeals for the Third Circuit in *Hohensee v. News Syndicate, Inc.*, 286 F.2d 527 (1961). For this reason alone the decisions below should be affirmed.

II. Applicable Decisions of This Court Require That Section 1406(a) Be Strictly Construed.

Entirely apart from the logical inconsistency of petitioner's position, its contention must be rejected because Section 1406(a) must be strictly construed. Petitioner's sole argument is that "Section 1406(a) is a remedial statute and as such should be broadly construed."[20] Petitioner's plea is without merit, because notwithstanding its remedial purpose, Section 1406 is in the nature of a jurisdictional statute and as such must be strictly construed.

The principle that "Courts created by statute can have no jurisdiction but such as the statute confers"[21] is one of long standing. And since "the jurisdiction of . . . [a federal court] is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears. . . ." *Hanford v. Davies*, 163 U. S. 273, 279 (1896); *Anderson v. Watt*, 138 U. S. 694, 702 (1891).

A similar presumption arises with respect to the transfer statutes because the power of transfer, unlike many judicial prerogatives, does not inhere in the United States district courts. Prior to 1948, no district court possessed the power or right to transfer an action from one district

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20. Petitioner's Brief, p. 6.

21. *Sheldon v. Sill*, 49 U. S. (8 How.) 440, 448 (1850).

to another for any reason.[22] But in that year Congress "radically altered the prior law"[23] which required dismissal when venue was defective,[24] by authorizing in Section 1406(a) the transfer of actions in which venue was improperly laid.[25] And it is clear that the transfer statutes must be construed consistently with principles applicable to jurisdictional provisions, because

> "A District Court is a separate entity. No District Court has jurisdiction crossing a state line. By virtue of these limitations, the transfer of any cause from one district to another is a question of power. No District Court has any such inherent authority. There must be an express statutory grant as a condition precedent to initiation of the transfer, and every essential factor must be present to confer jurisdiction on the court to which the case is sent."[26]

As the court pertinently observed with respect to the transfer statutes in *United States v. 11 Cases*, 94 F. Supp. 925, 927 (D. Ore. 1950): "the power of transfer is jurisdictional and may only be exercised in strict accordance with the statutory grant."

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22. *Kibler v. Transcontinental & Western Air*, 63 F. Supp. 724 (E. D. N. Y. 1945); *Brown v. Heinen*, 61 F. Supp. 563 (D. Minn. 1945); *United States v. 74 Cases*, 55 F. Supp. 745 (W. D. S. C. 1944); *Billings Utility Co. v. Federal Reserve Bank of Minneapolis*, 40 F. Supp. 309 (D. Mont. 1941). See also *In re Associated Gas & Electric Co.*, 83 F. 2d 734 (2nd Cir. 1936).

23. Moore's Commentary on the Judicial Code 195.

24. *Camp v. Gress*, 250 U. S. 308, 316 (1919).

25. Section 1404(a), which was enacted at the same time, authorizes transfer, instead of dismissal, when plaintiff brings suit in a forum which is inconvenient. Under prior law, the plaintiff suffered dismissal under the doctrine of *forum non conveniens* when suit was commenced in such a district. See *Norwood v. Kirkpatrick*, 349 U. S. 29 (1955).

26. *Felchlin v. American Smelting and Refining Company*, 136 F. Supp. 577, 581 (S. D. Cal. 1955).

Moreover, respondents submit that the decision of this Court in *Hoffman v. Blaski*, 363 U. S. 335 (1960) establishes a rule of strict construction of the transfer statutes. There, as here, this Court was asked to adopt a broad construction of a transfer statute. There, as here, "petitioner's 'thesis' and sole claim is that . . . [the statute] . . . , being remedial . . . [it] should be broadly construed. . . ." 363 U. S. at 342. There, as here, it was urged that the Court should adopt a broad construction of the statute since by its terms transfer can be ordered only if it be "in the interest of justice", and for that reason no possible abuse or prejudice could result from the construction urged.[27] There, as respondents submit this Court should do here, the broad construction urged was rejected.

Hoffman v. Blaski is entirely dispositive of petitioner's contention that the remedial purpose of Section 1406 requires or justifies the broad construction of that statute which it asks this Court to adopt. Section 1406(a) is in the nature of a jurisdictional statute and as such it should be strictly construed.[28] Respondents suggest that this Court be guided by the observations of the court below with respect to the proper construction of Section 1406(a).

> "The scope of judicial authority should not be lightly extended in the absence of a clear statutory

27. Petitioner here argues that since 1406 transfers must be "in the interest of justice" no "harassment of defendants" or other prejudice will result from the construction which it advances, and, for that reason, the Court should allow transfer in absence of personal jurisdiction. Petitioner's Brief, pp. 10-11. Significantly, the same argument was advanced in *Hoffman v. Blaski* and was there rejected. See the dissenting opinion of Mr. Justice Frankfurter, in which Mr. Justice Harlan and Mr. Justice Brennan joined, in *Sullivan v. Behimer*, 363 U. S. 351-69, at pp. 361-62.

28. This Court should not construe 1406 to permit transfer in the absence of personal jurisdiction for the additional reason that such a construction could raise serious constitutional questions under the due process clause. And it is well settled that this Court will, whenever possible, "give a statute an allowable construction that fairly avoids a constitutional issue." *United States v. CIO*, 335 U. S. 106, 129 (1948).

basis. While not relevant to the present appeal in its actual holding, *Miner v. Atlass*, 363 U. S. 641 (1960), is nevertheless a warning that federal courts should proceed with caution when considering the merit of implying basic procedural innovations. 'Although a liberal transfer statute might be wise, such a change is more properly a subject for legislative action after 'mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration [legislative] affords.' *Miner v. Atlass, supra*, p. 650."[29]

III. The Legislative History of the Statute Demonstrates That Personal Jurisdiction Is a Prerequisite to Transfer.

Not only does petitioner's contention impute irrationality to Congress and offend traditional, well-established principles of judicial construction of jurisdictional statutes, but petitioner seeks to attribute to Congress an intention which flies in the face of the statute's legislative history.

As initially enacted in 1948, Section 1406(a) required transfer when venue was improperly laid. It was recognized, however, that the provision for mandatory transfer might be subject to abuse. To avoid this possibility, Congress amended Section 1406(a) in 1949 to make transfer optional in the discretion of the district court "to prevent a plaintiff from deliberately bringing suit in the wrong district in order to effect service of process on the defendant and after perfecting service, obtaining a transfer of the case to the proper district."[30] The Senate Report states:

> "It is thought that this provision may be subject to abuse in that a plaintiff might deliberately bring a suit in the wrong division or district *where he could get service on the defendant*, and when the question

29. R. 109-110.

30. 1 *Moore, Federal Practice*, ¶ 0.146[4], p. 1906 (2d ed. 1960).

> of venue is raised the court is required to transfer the case to the court where it 'could have been brought.' *However, in the meantime, service has been perfected on a defendant in the wrong venue, and it will carry over into the new (and proper) venue.*" (Emphasis added.) [31]

Implicit in the foregoing statement is Congress' recognition that Section 1406(a) is inoperative unless plaintiff brings suit in a district "where he could get service on the defendant" and that it is a prerequisite to transfer that "service has been perfected on defendant in the wrong venue. . . ." Accordingly, it is clear that Congress did not intend Section 1406(a) to authorize transfer when the transferor court lacks personal jurisdiction over the defendant.

The Court of Appeals for the Third Circuit agrees that in enacting Section 1406(a), Congress did not intend to authorize transfer in the absence of personal jurisdiction, *Hohensee v. News Syndicate, Inc.*, 286 F. 2d 527, 529-30 (3rd Cir. 1961):

> ". . . The sole purpose of this section [1406(a)] as well as its companion, 28 U. S. C. § 1404, was to provide a means for curing a defect in venue whether it be improperly laid or improper because of the inconvenience of the parties. Venue has to do with determining the proper place where litigation may proceed. It has nothing to do with determining the extent of the area in which a party defendant may be properly served. The appellant here is, in effect, attempting to turn a venue provision into a device for including New York within the area where appellee can be properly served under Rule 4(d) of the Federal Rules of Civil Procedure, 28 U. S. C. A., in an action commenced in

31. Sen. Rep. No. 303, 81st Cong., 1st Sess., U. S. Code Cong. Serv. 1253 (1949).

Pennsylvania. We are satisfied that Section 1406 was never intended to serve as a means of avoiding the consequences of a failure to perfect service of process. It would take a clear congressional mandate for this court to allow that section to be used as a shorthand method for assisting a party to effect jurisdiction of the person."

IV. The Decisions Upon Which Petitioner Relies Are Either Inapplicable or the Proposition for Which They Are Cited Was Not in Issue.

Petitioner asserts that the construction of Section 1406(a) which it urges this Court to adopt is supported by the decisions of the Courts of Appeals for the Fourth, Ninth and District of Columbia Circuits.[32] Respondents submit that the decisions relied upon by petitioner as impeaching the holdings below and the same holding of the Court of Appeals for the Third Circuit in *Hohensee v. News Syndicate, Inc., supra,* are either inapplicable or the proposition for which they are cited by the petitioner was not in issue or was conceded without argument in those cases.

Petitioner's citation of *Orion Shipping and Trading Company v. United States,* 247 F. 2d 755 (9th Cir. 1957), is typical. *Orion* was an appeal from the dismissal of third party proceedings instituted by a ship owner against the United States. The United States claimed that venue was improperly laid since Orion did not reside or have its principal place of business in the district in which suit was instituted. The Court of Appeals held that the dismissal was erroneous and remanded with directions to transfer the action pursuant to Section 1406(a). *Orion* in no respect involved the power of the district court to transfer in the absence of personal jurisdiction. There, the transferor court had jurisdiction over the person because the United

32. Petitioner's Brief, p. 7.

States,[33] the third party defendant, had "appeared and answered." 247 F. 2d at 758.

Petitioner likewise seeks to create the impression that *Amerio Contact Plate Freezers, Inc. v. Knowles*, 274 F. 2d 590 (D. C. Cir. 1960), held that Section 1406(a) authorizes transfer in the absence of personal jurisdiction. Although the language relied upon by petitioner appears to support petitioner's contention, the proposition for which it is cited was there conceded without argument. In *Amerio*, the plaintiff brought suit in a district in which venue was improperly laid and failed to make proper service of process on the defendant. The lower court granted defendant's motion to dismiss for lack of jurisdiction and denied plaintiff's motion to transfer pursuant to Section 1406(a). On appeal, appellee, the defendant below, argued merely that the transferor court lacked jurisdiction over *the subject matter of the action*, and that, as a result, the district court was powerless to order the transfer. In fact, the appellee expressly conceded that the transferor court's lack of personal jurisdiction over the appellee was no bar to the requested transfer.

> "Appellant relies on *Schiller v. Mit-Clip Co.* . . . as standing for the proposition that a civil action may be transferred to another district to correct venue where the transferring district has jurisdiction of the subject matter of the action, but not of the person of the defendant. *We do not disagree with the statement of the rule.* . . .
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> "It is appellee's position that . . . special jurisdictional prerequisites . . . were not met in this case and that because of this fact the District Court for the District of Columbia *obtained no jurisdiction over the*

33. Personal jurisdiction can be acquired over the United States in any judicial district in which it is sued. Rule 4(d)(4), Federal Rules of Civil Procedure.

subject matter of this action. It accordingly properly refused to transfer the case and dismissed the action." (Emphasis added.) [34]

Accordingly, petitioner's reliance upon *Amerio* is unwarranted because the proposition for which petitioner cites *Amerio* was there conceded without argument. And in *Hayes v. Livermont*, 279 F. 2d 818 (D. C. Cir. 1960), the question of whether a district court has the power to transfer in the absence of personal jurisdiction does not appear to have been in issue.

Internatio-Rotterdam, Inc. v. Thomsen, 218 F. 2d 514 (4th Cir. 1955), also relied on by petitioner, was an admiralty action. As Judge Staley, speaking for the court in *Hohensee v. News Syndicate, Inc., supra*, stated (p. 530, n. 6):

> ". . . Admiralty cases . . . are inapposite for the reasons succinctly stated in another admiralty case appellant cites, *Internatio-Rotterdam, Inc. v. Thomsen*, 4 Cir. 1955, 218 F. 2d 514, 515, where Judge Parker said:
>
> " 'As the suits were in admiralty, they might have been instituted in any district court of the United States. * * * It is proper to institute a suit in admiralty in a district in which there is no person who can be served with process and no property which can be seized, if it is made to appear that property which can be seized under process therein is expected to be within the district shortly * * *.' "

Moreover, as Judge Parker noted in *Internatio*, venue is a concept foreign to admiralty (218 F. 2d at 516, n. 1):

> "A suit in admiralty must be distinguished in this respect [institution of suit] from a civil action based

34. Appellee's Brief on Appeal in *Amerio Contact Plate Freezers, Inc. v. Knowles*, in the United States Court of Appeals for the District of Columbia Circuit, No. 15,150, pp. 12-13, 15.

on diversity of citizenship in which venue is limited by statute."

Accordingly, since the venue of antitrust suits, like diversity actions, is limited by statute,[35] *Internatio* does not sanction the transfer of a civil antitrust action in which venue is so limited.

Respondents submit that the decisions relied upon by petitioner do not support the construction of the statute for which petitioner contends.

V. The Decisions Below Impose No Restrictions Upon the Statute Nor Hardship Upon Petitioner.

Petitioner's characterization of the decisions below as imposing "restrictions" upon Section 1406 obviously presupposes the validity of petitioner's construction of the statute. But entirely apart from petitioner's presumption, the decisions below do not circumscribe the operation of the statute.

Although generalization may be difficult, requirements with respect to the laying of venue usually are more strict than those with respect to personal jurisdiction. Thus when federal jurisdiction is based upon diversity of citizenship, venue must be laid either in the district of all of the plaintiffs' or all of the defendants' residence. 28 U. S. C. § 1391(a). And when jurisdiction is predicated upon the existence of a federal question, venue is proper only in the district of the residence of all of the defendants. 28 U. S. C. § 1391(b).[36] But in either case requirements with respect to personal jurisdiction can be satisfied irrespective of the residence of the defendant if service is made upon an

35. Clayton Act, Sections 4 and 12, 15 U. S. C. §§ 15, 22.

36. This is true except where, as here, venue is governed by statutory provisions peculiar to a specific federal statutory cause of action. See, for example, the statutes cited at page 12, footnote 15, of petitioner's Brief. And when the defendant is a corporation, the venue of diversity and federal question cases may be laid in any district in which the corporation is incorporated or is "licensed to do business or is doing business. . . ." 28 U. S. C. § 1391(c).

individual personally wherever he may be found[37] or upon a corporation by serving "an officer, a managing or general agent, or . . . any other agent authorized by appointment or law to receive service of process . . ."[38] Accordingly, it is entirely possible that suit can be instituted in a district in which service can be perfected, but in which venue would be improperly laid.[39] As a result, the construction of 1406 adopted below does not make it available, as the dissenting Judge claimed, "only when there . . . [is] . . . no occasion for its use"[40] (R. 118).

Petitioner contends that the decisions below must be reversed else 1406 will never be applicable to the transfer of

37. Rule 4(d)(1), Federal Rules of Civil Procedure.

38. Rule 4(d)(3), Federal Rules of Civil Procedure. In addition, individuals and corporations can be served in any manner authorized by state practice. Rule 4(d)(7), Federal Rules of Civil Procedure. And with respect to several types of federal question cases, the appropriate method of service is prescribed by statute. See, for example, Section 12 of the Clayton Act, 15 U. S. C. § 22.

39. One of the most typical examples of suits in which service frequently is perfected in the district in which suit is instituted but in which venue is improper are diversity actions where service is made pursuant to state statutes which authorize service upon the Secretary of State or some other state official by virtue of the doing of an act within the state, when neither party is a resident of that state. See, for example, *Olberding v. Illinois Central R. Co.*, 346 U. S. 338 (1953).

40. On the contrary, transfers have been ordered in many cases under Section 1406(a) where the transferor court had personal jurisdiction over the defendants but where venue was improper. Representative reported decisions in a wide variety of types of cases include: *Orion Shipping and Trading Company v. United States*, 247 F. 2d 755 (9th Cir. 1957) (see textual discussion of *Orion* at pp. 19-20 *supra* and note 33 *supra*); *Untersinger v. United States*, 181 F. 2d 953 (2nd Cir. 1950); *Gold v. Griffith*, 190 F. Supp. 482 (N. D. Ind. 1960); *Dennis v. Galvanek*, 171 F. Supp. 115 (M. D. Pa. 1959); *Jacobson v. Indianapolis Power & Light Company*, 163 F. Supp. 218 (N. D. Ind. 1958); *United Nations Korean Reconstruction Agency v. Glass Production Methods, Inc.*, 143 F. Supp. 248 (S. D. N. Y. 1956); *Sherck v. Hagan*, 135 F. Supp. 293 (D. N. D. 1955); *United Merchants & Manufacturers, Inc. v. United States*, 123 F. Supp. 435 (M. D. Georgia 1954); *Norris v. Yates*, 109 F. Supp. 436 (W. D. Pa. 1953); *Sullivan v. Kilgore Mfg. Co.*, 100 F. Supp. 983 (E. D. N. Y. 1951); *Squires v. The Ionian Leader*, 100 F. Supp. 829 (D. N. J. 1951). *Cf. Wilt v. Smack*, 147 F. Supp. 700 (E. D. Pa. 1957).

civil antitrust actions against corporate defendants. But since Congress in Section 12 of the Clayton Act [41] has laid the venue of private antitrust actions against corporate defendants in any district where the corporation transacts business and has authorized extraterritorial service of process upon such a defendant whenever venue is properly laid in the district in which the action is instituted, a private antitrust plaintiff can prosecute his action in any district in which a corporate defendant transacts business. As a result "a corporation could . . . be held to be transacting business, and venue [and personal jurisdiction] established, '—although not present by its agents carrying on business of such character and in such manner that it is "found" therein and is amenable to local process,—if in fact, in the ordinary and usual sense, it "transacts business" therein of any substantial character.' " [42] Section 12 in permitting suits against corporate defendants wherever they "transact business" represents the fullest implementation of the Congressional policy to facilitate the private enforcement of the antitrust laws.

Petitioner cannot, therefore, urge an expansive construction of 1406 on the ground that to hold otherwise would frustrate Congressional policy because, whatever the construction adopted, 1406 is a statute of general application which cannot, for that reason, conflict with a Congressional policy which has been implemented by specific statute.

Petitioner's complaint that the decisions below frustrate the "Congressional policy . . . to facilitate the private antitrust suitor's prosecution of his claim against alleged antitrust violators" [43] obviously is directed to the deci-

41. Section 12 provides: "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

42. *Goldlawr v. Shubert*, 169 F. Supp. 677 (E. D. Pa. 1958) (R. 25, at 27) quoting from *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 373 (1927).

43. Petitioner's Brief, p. 14.

sion of the district court below with respect to the scope of Section 12 of the Clayton Act rather than to the decisions below with respect to Section 1406 of Judicial Code. And as the court below observed, petitioner's "real difficulty here is that it has failed to meet the requirements"[44] of Section 12.

It is somewhat surprising that petitioner should urge that the decision below "unduly burdens"[45] petitioner, when petitioner has conceded its failure to comply with the provisions of the Clayton Act, which, unlike Section 1406(a), was expressly enacted to facilitate private enforcement of the antitrust laws. Accordingly, by urging an expansive construction of Section 1406, petitioner in effect seeks judicial amendment of Section 12 of the Clayton Act.

In addition, petitioner urges that the "hardship" of the holding below "is illustrated in the instant case."[46] Petitioner apparently contends that through no fault of its own, it will be deprived of the right to recover damages with respect to the "larger part" of its "claim"[47] against respondents Select Operating Corporation and United Booking Office, Inc.[48] if the decision below is affirmed. Not only is its contention irrelevant even if otherwise true, but petitioner does not disclose that despite a challenge to the court's jurisdiction made by respondents in 1956 in the Eastern District of Pennsylvania, petitioner did not take the precautionary step of preserving its rights under the statute of limitations by filing suit against respondents in the Southern District of New York until August 20, 1959, subsequent to the decision of the district court below. Petitioner could have avoided the claimed "hardship" resulting from the decisions below by the prompt prosecution of its claims in the Southern District of New York where re-

44. R. 114.
45. Petitioner's Brief, p. 15.
46. Id., p. 13.
47. Id., p. 14.
48. With respect to other suits which petitioner has instituted against other defendants to enforce the same "claim", see footnotes 2, 10, 11, *supra*.

spondents and all of the other defendants were amenable to suit, when alerted in 1956 of the jurisdictional defects attending the action instituted in Philadelphia. Accordingly, any "hardship" resulting from the decisions below is of petitioner's own manufacture.

CONCLUSION.

The decisions below that Section 1406(a) does not authorize transfer in the absence of personal jurisdiction are clearly correct. Petitioner's contention to the contrary imputes irrationality to Congress, violates applicable rules of construction of jurisdictional statutes and flies in the face of the statute's legislative history. The opinions relied upon by petitioner do not support the construction which it urges and the decisions below impose no restrictions upon the statute nor hardship upon petitioner.

For the foregoing reasons, the judgment of the Court of Appeals affirming the dismissal of the transferred actions as to respondents Select Operating Corporation and United Booking Office, Inc. by the district court below should be affirmed.

Respectfully submitted,

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